84-1835

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AETNA CASUALTY AND SURETY COMPANY, ALLSTATE INSURANCE COMPANY, FARM FAMILY MUTUAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INTERBORO MUTUAL INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, MARYLAND CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UTICA MUTUAL INSURANCE COMPANY, GERALD J. PIERCE, WEST END BREWING COMPANY OF UTICA NEW YORK, MARILYN STROHSCHEIN, MADELINE CHRISMAN and ADOLFINA RUIZ,

Appellants,

—v.—

RODERICK CHU, as Commissioner of Taxation and Finance of the State of New York; JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York; and MARTIN A. FISCHER, ALBERT C. TODARO, EASTMAN BIRKETT, RIVKA CHATMAN, CHARLES G. MOERDLER, BART DiMATTINA, LOUISE COSTE, JAMES HENRY SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a state can shelter its repudiation of its contractual obligations from Contract Clause scrutiny by imposing a stricter standard of justiciability than has been required in prior decisions of this Court.

2. Whether a state law invading insurance security funds for general revenue purposes, despite a statutory promise to hold those funds "separate and apart" and an express statutory "pledge" of the state's "faith and credit" for the "safekeeping" of those funds, is invalid under the Contract Clause of the United States Constitution.*

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* In accordance with Rule 28.1 of the Rules of ths Court, appellants make the following statements concerning their parent corporations, subsidiaries, other than wholly-owned subsidiaries, and affiliates, if any:

(a) Aetna Casualty and Surety Company states that its parent corporation is Aetna Life and Casualty Company, and that, other than wholly-owned subsidiaries, it does not own a controlling interest of more than 50% in any subsidiaries.

(b) Allstate Insurance Company states that its parent corporation is Sears, Roebuck and Company. Allstate's affiliates and subsidiaries, other than wholly-owned subsidiaries, are Allstate Insurance Company of Canada; The Armstrong Rubber Company; Copolymer Rubber and Chemical Corporation; DeSoto, Inc.; Roper Corporation; Sears, Roebuck de Mexico, S.A. de C.V.; Sears Canada, Inc.; Sears Acceptance Co., Ltd.; Simpson-Sears Properties Ltd.; and Universal Rundle Corp.

(c) Farm Family Mutual Insurance Company states that the Farm Family Life Insurance Company is an affiliate.

(d) Government Employees Insurance Company states that its parent corporation is the GEICO Corporation.

(e) Hartford Fire Insurance Company states that its parent corporation is the International Telephone and Telegraph Corporation.

(f) Liberty Mutual Insurance Company states that, other than wholly owned subsidiaries, it owns a controlling interest of more than 50% in Liberty Northwest Insurance Company; Liberty Life Assurance Company of Boston; Helmsman Management Services, Inc.; Liberty International Agency, Inc.; and Liberty Mutual Insur-

ance Company, Ltd. Liberty Mutual Fire Insurance Company is an affiliate.

(g) Lumbermens Mutual Casualty Company states that, other than wholly-owned subsidiaries, it owns approximately 44% of the Kemper Corporation.

(h) Maryland Casualty Company states that its parent corporation is American General Corporation.

(i) Travelers Indemnity Company states that its parent corporation is the Travelers Corporation.

(j) Utica Mutual Insurance Company states that, other than wholly-owned subsidiaries, it owns a controlling interest in one subsidiary, Republic Franklin Insurance Company. It is under common management with Graphic Arts Mutual Insurance Company. William Street Syndicate, Inc., is an affiliate.

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AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AETNA CASUALTY AND SURETY COMPANY, ALLSTATE INSURANCE COMPANY, FARM FAMILY MUTUAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INTERBORO MUTUAL INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, MARYLAND CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UTICA MUTUAL INSURANCE COMPANY, GERALD J. PIERCE, WEST END BREWING COMPANY OF UTICA NEW YORK, MARILYN STROHSCHEIN, MADELINE CHRISMAN and ADOLFINA RUIZ,

Appellants,

—v.—

RODERICK CHU, as Commissioner of Taxation and Finance of the State of New York; JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York; and MARTIN A. FISCHER, ALBERT C. TODARO, EASTMAN BIRKETT, RIVKA CHATMAN, CHARLES G. MOERDLER, BART DIMATTINA, LOUISE COSTE, JAMES HENRY SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants seek review of a decision of the New York Court of Appeals in which appellants' Contract Clause challenge to a raid by the New York legislature into insurance security funds was rebuffed. The Court of Appeals held that appellants had not presented a justiciable controversy. On the basis of this holding, which is contrary to the decision of this Court in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the state court declined to review the validity under the Contract Clause of a statute directly contravening an express statutory "pledge" of the "faith and credit of the State of New York."

OPINIONS BELOW

The February 21, 1985 opinion and final order of the New York Court of Appeals (App. A, 1a-5a)[1] is reported at 64 N.Y.2d 379. The June 1984 memorandum decision of the Appellate Division, First Department of the New York Supreme Court (App. B, 6a-7a) is reported at 102 A.D.2d 775 and 479 N.Y.S.2d 23 *sub nom. American Insurance Association* v. *Bouchard*. The order of New York Supreme Court, New York County, Special Term (App. D, 10a-14a) dismissing the complaint is not reported.

JURISDICTION

The final order of the New York Court of Appeals was issued on February 21, 1985 (App. A, 5a).[2] A notice of appeal to this Court (App. G, 36a-38a) was filed on May 16, 1985 with the New York Court of Appeals and with the Clerk of the New York Supreme Court, New York County. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

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1 "App." refers to the appendix bound with this Jurisdictional Statement.

2 The Court of Appeals does not issue a final judgment *per se*, but issues a remittitur to the court of original jurisdiction. The remittitur from the Court of Appeals in this case was docketed by New York Supreme Court, New York County, on February 28, 1985. Appellees have not sought any further relief from that court.

STATUTORY PROVISIONS INVOLVED

Chapter 55 of the Laws of 1982, Sections 84, 88, 90 and 92, is reprinted at App. H, 39a-42a. Chapter 404 of the Laws of 1982 is reprinted at App. H, 43a-44a. Section 333(6) of New York Insurance Law is reprinted at App. H, 44a-45a. Sections 27(6) and 109-b of New York Workers' Compensation Law are reprinted at App. H, 45a-46a.

STATEMENT

A. Summary

On three occasions, in 1922, 1935, and 1969, New York State established by statute segregated trust funds (the "Funds") to provide security, in the event of an insurer's insolvency, for persons entitled to payment under certain policies of property, liability and workers' compensation insurance.[3] On each occasion, the legislature promised in clear statutory language to leave the Funds intact. As to two of the Funds, the governing statutes provide that their assets:

> shall be separate and apart [. . .] from all other state moneys, and the faith and credit of the State of New York is pledged for its [their] safekeeping. (App. H, 44a, 46a.)

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3 In almost every other state, insurance companies protect policyholders and beneficiaries from loss due to insurer insolvency by assessments of insurance carriers after an insolvency. New York State eschewed this "post assessment" fund approach, instead setting up state-held "pre-assessment" security funds with assets supplied by assessments of carriers doing business in New York. These Funds in some ways resemble bank guaranty or insurance funds, established to insure the deposits in state-chartered financial institutions, which have received considerable public attention in recent years. In Ohio, Nebraska and California, the assets in bank guaranty funds have been shown to be insufficient to cover major insolvencies; Nebraska depositors still remain unpaid, more than a year after the losses occurred. *See* Kristof, *Private Insurance in Spotlight*, N.Y. Times, May 15, 1985 at D19, col. 1; Sloane, *Role of Private Insurance Funds*, N.Y. Times, March 16, 1985, at 31, col. 3.

In 1982, the state legislature transferred $204 million from these Funds to the general fund of the state treasury, to be used for general state purposes (App. H, 42a). At the same time, the legislature made "dry appropriations," providing in substance that the money would be returned if the funds were ever completely depleted (App. H, 43a). It was this 1982 legislation which the New York Court of Appeals declined to review, finding that no justiciable controversy was presented (App. A, 1a-5a).

B. The Funds

The Funds at issue are the Property and Liability Insurance Security Fund (PLIS), the Stock Workers' Compensation Security Fund (SWCF), and the Aggregate Trust Fund (ATF). The PLIS Fund, created by N.Y. Ins. Law § 334, protects property and liability insurance policyholders against the insolvency of their insurers, and is funded by payments from property and liability insurance carriers. The SWCF, established by Section 109-b of the Workers' Compensation Law, serves the same purpose for those entitled to compensation benefits from a stock insurer. The governing statutes of the SWCF and of the PLIS Fund contain the express "pledges" of "the faith and credit of the State of New York" quoted at page 3 above. N.Y. Work. Comp. Law § 109-b; N.Y. Ins. Law § 333(6). The ATF was established to secure awards of death benefits or other future periodic benefits. An employee or insurer which pays the present value of the award into the ATF is thereby discharged from further liability. The ATF is a "Trust Fund" by its very name, and Section 27(6) of N.Y. Work. Comp. Law provides that its assets "shall be kept separate and apart from all other moneys of the state fund."

C. The Challenged Legislation

Chapter 55 of the New York Laws of 1982 ("Chapter 55") directed the transfer of $50 million from the ATF, $67 million from the SWCF and $87 million from the PLIS Fund into the general fund of the New York State treasury. Sections 84, 88

and 90 of Chapter 55 provide that the appropriations "shall be deemed an asset" of the Funds, and that the transfer from the Funds to the general fund shall be deemed a prudent investment. Chapter 404 of the Laws of 1982 provided for "dry appropriations" to each of the Funds in an amount equal to the sum taken. A "dry appropriation" is an appropriation from which "no expenditure may be made . . . if other assets of such fund are available for making payments as provided by law." In other words, the "appropriation" is inoperative unless the Fund involved is insolvent. These "appropriations" have been ignored by the State in calculating whether its budget is "balanced."

D. The Litigation

Appellants—three trade associations of insurance companies, thirteen companies engaged in writing relevant lines of property and casualty insurance, two policyholders of such insurance, and three beneficiaries of the ATF— filed this action for declaratory and injunctive relief on September 27, 1982, in New York Supreme Court, New York County. Appellants sought (i) a declaration that Chapter 55, insofar as it directed transfers of any assets of the Funds to the general fund of the state treasury, is unconstitutional and void, and (ii) an injunction preventing those transfers or requiring return of any money so transferred.[4] The complaint named as defendants the officials who were required by the challenged legislation to pay the assets of the Funds into the New York State treasury. They or their successors are the appellees here.

Appellants moved, and the Commissioner of Taxation and Finance and the Superintendent of Insurance of the State of New York cross-moved, for summary judgment.[5] In an order

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4 The complaint attacked Chapter 55 not only under the Contract Clause, but also under the Due Process and Just Compensation Clauses of the Constitution. The just compensation and due process issues are not presented here.

5 Appellees Fischer, Todaro, Chatman, Moerdler, DiMattina, Coste and Scholtz, who with appellee Roberts are the trustees of the ATF, did

entered on June 30, 1983, the Supreme Court, New York County, Special Term dismissed the complaint on the ground that appellants had not presented a justiciable controversy as required for a declaratory judgment under New York Civil Practice Law 3001. The court did not address the merits of appellants' constitutional claims (App. D, 10a-14a).

In an order and memorandum decision of June 26, 1984, the Appellate Division, First Department, of the New York Supreme Court modified the order of Special Term and struck the provision finding the controversy nonjusticiable. Relying solely on its simultaneous decision in *Methodist Hospital* v. *State Insurance Fund*, reported at 102 A.D.2d 367, 479 N.Y.S.2d 11 (App. F, 16a-35a), the Appellate Division found and declared Chapter 55 to be constitutional. The decision in *Methodist Hospital* concerned another section of Chapter 55 in which a similar transfer of money was made from the State Insurance Fund. The Appellate Division, in relying on *Methodist Hospital* to uphold the statutory provisions involved in this case, did not address the fact that the promissory language of the statutes on which appellants rely here was not present in *Methodist Hospital*.

On appeal, the New York Court of Appeals held that "the action is premature and as a matter of law may not be maintained [because] the issue presented for adjudication involves a future event beyond control of the parties which may never occur." The court found that the possibility of insurer insolvencies against which plaintiffs would be left unprotected was such a "future event"—an event which, the court said, was unlikely to occur in light of the substantial balances now remaining in the Funds and the existence of the "dry appropriations." Because it believed appellants' claim to be nonjusticiable, the Court of Appeals ordered that the Appellate

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not attempt to defend the challenged legislation, but in their Answer and Crossclaim asked for a declaratory judgment whether Chapter 55, insofar as it relates to the ATF, is violative of the Constitution of the United States or the State of New York.

Division's declaration that Chapter 55 is constitutional be stricken, and the complaint dismissed.

The gist of the Court of Appeals holding is that, where a state is accused of having broken a promise to provide specific security against an unpredictable future event, the claim is not justiciable so long as the state courts find the feared event is unlikely to occur. This holding, we submit, is contrary to *United States Trust Co.* v. *New Jersey*, and, if allowed to stand, will allow the states freely to disregard their solemn promises.

THE QUESTIONS ARE SUBSTANTIAL

In a case where the claim is made that a state statute impairs the obligation of a contract alleged to have been created by an earlier state statute, this Court must decide for itself whether a contract has been made and whether the State has, by later legislation, impaired its obligation in violation of the Contract Clause. *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938). The views of the State's highest court on the issues are accorded respectful consideration and great weight, but this Court's independent judgment is necessary to prevent the constitutional mandate of the Contract Clause from becoming a dead letter. *Id.*

The need for such independent analysis is obvious. If a State makes contractual promises by statute, impairs those obligations in violation of the Contract Clause, but sustains its actions in its own courts under its own laws, it has simply sat in judgment of its own wrongdoing and found itself innocent. The same is true if the State's courts dismiss the action by deeming the impairment not to present a justiciable controversy. While some deference to the state court judgment is due, it must be tempered by the realization that the State's interest in shielding its legislation from constitutional scrutiny may have played a role in the outcome.

This case illustrates these principles. The State's breach of its own promises could hardly be more blatant—the State explicitly "pledged" its "faith and credit" for the "safekeeping" of certain assets, and then seized those assets for itself. None of the three opinions of the various state courts even attempts a reasoned defense of Chapter 55 as consistent with the Contract Clause.

Instead, the New York courts have simply refused to consider appellants' claims at all. The Court of Appeals has interposed an improper threshold justiciability requirement to avoid addressing the constitutional issue.

A. The State Court's Holding on Justiciability Improperly Sheltered the State's Breach of its Own Obligations from Contract Clause Scrutiny

The Court of Appeals' holding that this case is not "ripe for determination" ignores the fact that what appellants are complaining about is the breach of a promise not just to pay the obligations of insolvent insurers, but to provide *security* for that payment. The security which the state "pledged" to provide was the setting aside of particular assets in "safekeeping." The State's seizure of those assets, by removing the promised security, has inflicted a present, concrete injury on appellants, not a hypothetical future one, and the case is therefore ripe for review. *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

Appellants' claims that the State has impaired its promises to provide security are not speculative. The action by the State on which this case is based—the transfer of money out of the Funds into the state treasury—has already occurred. A decision of this Court would therefore not be merely an advisory opinion; it would have the immediate effect of returning the assets to the Funds.

An analogy may help to clarify the harm already suffered by appellants. If a borrower promises a lender that it will set aside certain assets in safekeeping as security for its obligations to a lender, and then the borrower takes some of those assets out of safekeeping and disposes of them, the lender has been harmed. He was entitled to all the security that was promised him, and having lost some of this security, he has a justiciable complaint. His complaint is justiciable even if the borrower has not yet defaulted on the loan—indeed even if the borrower is seemingly solvent, and the remaining security for the loan appears to be ample. Similarly, appellants here have a justiciable claim for the enforcement of a promise the state has broken.

The New York Court of Appeals applied state law standards in denying the justiciability of appellants' federal constitutional claims (App. A, 4a; D, 14a). The state court's determination on this issue is not, however, binding on this Court for purposes of its appellate jurisdiction, since that is a federal matter. 12 J. Moore, *Federal Practice*, ¶ 506.01 at 8-20 (1982). Justiciability becomes a federal question when necessary to ensure that federal rights are protected. *See* 16 C. Wright & A. Miller, *Federal Practice & Procedure*, § 4023 at 713-14 (1977); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964). This Court has repeatedly applied this principle in reviewing state court decisions concerning federal rights. *Secretary of State* v. *Joseph H. Munson Co.*, 104 S.Ct. 2839, 2846 n.4 (1984); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 282 (1961); *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). Otherwise, a state could use its standards of justiciability to prevent the enforcement of federal constitutional rights—which is in substance what New York has done here.

In *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), this Court considered and decided a Contract Clause issue indistinguishable from the one the Court of Appeals held "nonjusticiable" here. *United States Trust Co.* was a suit by

bondholders who complained—as appellants here complain—that a state, by failing to keep its promise, had made their expectations of future payments less secure.

The promise repudiated in *United States Trust Co.* was a statutory covenant that revenues of the Port Authority of New York and New Jersey would not be used to subsidize railroad transportation. There is no suggestion in the case that repeal of the covenant had made default on the Port Authority's bonds imminent, or even likely. Indeed, it is not even suggested that any money had actually been diverted to railroad purposes; the State had simply withdrawn its promise not to use revenues in that way. And the Court expressly declined to resolve the question of how much impact the State's repudiation of its contract had on the value of the bonds. 431 U.S. at 19. While the Court did not discuss the question of justiciability, the removal of what the Court called "an important security provision" was plainly thought enough by itself to render the controversy justiciable. *Id.*

The Court of Appeals here found its decision consistent with *United States Trust Co.*, relying on the remark of the Court in that case that the Port Authority's covenant had not been "replaced by an arguably comparable security provision" (App. A, 5a). The Court of Appeals implied that such an "arguably comparable" provision is to be found here in the "dry appropriations." But the Court's comment in *United States Trust Co.* was directed at the merits, not the justiciability issue, and in any event the "dry appropriations" here are not "arguably comparable" to the promised setting aside of money in "safekeeping." The "dry appropriations" are not a "security" provision at all. They are unsecured, revocable and essentially empty recitals to the effect that, if necessary, the legislature *will* replace the security it has taken away. To return to the analogy of the borrower and lender: the borrower who has removed collateral which he promised to hold in safekeeping does not render the lender's complaint nonjusticiable by stating that he will restore the collateral when and if it is needed.

In another decision which supports a finding of justiciability here, this Court held that constitutional challenges to the Price-Anderson Act, which limited liability for nuclear accidents resulting from the operation of federally-licensed private nuclear power plants, were ripe for adjudication. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978). In *Duke Power*, this Court stated:

> [a]lthough it is true that no nuclear accident has yet occurred and that such an occurrence would eliminate much of the existing scientific uncertainty surrounding this subject, it would not, in our view, significantly advance our ability to deal with the legal issues presented nor aid us in their resolution. * * * Similarly, delayed resolution would frustrate one of the key purposes of the Price-Anderson Act—the elimination of doubts concerning the scope of private liability in the event of a major nuclear accident.

Id.

Like the plaintiffs in *United States Trust Co.* and *Duke Power Co.*, appellants should not have to wait for the ultimate disaster—nonpayment of obligations—for adjudication of their constitutional claims. The justiciability requirement relied on by the New York Court of Appeals here is an unjustified impediment to the vindication of appellants' federal rights. This Court should note probable jurisdiction to consider whether a state court may block adjudication of federal constitutional claims in this manner.

B. The Challenged Legislation Is an Unconstitutional Impairment of the State's Contracts

This Court's decision in *United States Trust Co.*, and its other decisions involving impairment by states of their own contracts, mandate consideration of the important issues presented by appellants here. For as this Court has stated, "[w]hen a State itself enters a contract, it cannot simply walk away from its financial obligations." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S.Ct. 697, 705, n.14 (1983). As a noted constitutional commentator has said:

> For its own purposes, a government may find it convenient, sometimes indeed imperative, to signal its trustworthiness and thus to induce the sort of reliance it could instead have spurned. When the government makes that choice, a powerful argument may be advanced that the most basic purposes of the impairment clause, as well as notions of fairness that transcend the clause itself, point to a simple constitutional principle: *government must keep its word.*

L. Tribe, *American Constitutional Law* § 9-7, at 470 (1978) (footnote omitted).

This Court's decisions have been uniform in subjecting state statutes impairing a state's own contracts to a stricter scrutiny that those impairing private contracts. *See, e.g., United States Trust Co.*, 431 U.S. at 25-26; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. at 100. One commentator has suggested that:

> [i]n a public-contract case, a court should presume that impairment of the contract upset legitimate expectations. In entering into the contract, the state negotiated its terms and committed itself expressly to honoring the contract. As a consequence of this express commitment, other parties are strongly justified in relying upon enforcement of the contract. The stricture against the state's breaking its word therefore applies with great force.

Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623, 1647 (1980).

This Court has recently acknowledged in dictum its past observations on the subject of government impairment of its own contracts:

> "There is clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgeor. This Court has given no sanction to such a conception of the obligations of our Government." *Perry* v. *United States*, 294 U.S. 330, 350-351 (1935).
>
> Thus, the Court has observed that in order to maintain the credit of public debtors, see *Lynch* v. *United States*, 292 U.S. 571, 580 (1934), and because the "State's self-interest is at stake," *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977), the Government's impairment of its own obligations perhaps should be treated differently. See also *Allied Structural Steel Corp.* v. *Spannaus*, 438 U.S. 234, 244, n.15 (1978).

National Railroad Passenger Corp. v. *Atchison, Topeka & Santa Fe Ry.*, 53 U.S.L.W. 4285, 4291 n.24 (1985).

The case presented by appellants here is closely analogous to that in *United States Trust Co.* The approach taken by the court in that case requires consideration of whether: (1) the State has created contractual obligations; (2) the obligations have been substantially impaired; and (3) the impairment is reasonable and necessary. Here, this analysis shows that the Contract Clause question is, at the very least, a substantial one.

1. The State of New York has created contractual obligations by statute

It is well established that a legislature may enact statutes which constitute contracts between the State and persons acting in reliance upon them, and that those contracts are subject to the protection of Art. I, § 10. *United States Trust Co.*, 431 U.S. at 17, n.14; *Indiana ex rel. Anderson*, 303 U.S. at 100. While "this Court simply will not construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the state is a party," *National Railroad Passenger Corp.*, 53 U.S.L.W. at 4290, an obligation may be found where the intent to limit a legislature's powers is clearly and unequivocally expressed. *Id.*

The initial object of inquiry must be the language of the statutes themselves. *Id.* In this case, the language of the statutes, and thus the intent of the legislature, could not be clearer. The statutes governing the PLIS Fund and the SWCF specifically "pledge" the "faith and credit of the State of New York" for the "safekeeping" of those Funds. N.Y. Ins. Law § 333(6), N.Y. Work. Comp. Law § 109-b. The statutes establishing all of the Funds provide that the money in them "shall be separate and apart" from any other state-held money, and the ATF is denominated by statute as a "trust fund." *Id.*; N.Y. Work. Comp. Law § 27(6).

On its face, this promissory language limits the legislature's powers over the assets of the Funds in the future. By the use of this language, the State entered into a contract, at least with the policyholders and beneficiaries of the insurance policies in question,[6] to hold these assets safe and separate from any other funds. The language is clearly calculated to induce people dependent on payments under workers' compensation and

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6 Appellants here include policyholders and beneficiaries, as well as insurance companies and trade associations. Thus the issue of probable jurisdiction does not depend on whether the insurers, as well as the policyholders and beneficiaries, acquired contractual rights under the statutes.

property insurance policies to rely upon the Funds for security, and to omit any other means of protecting themselves against the risk of insolvency.

This Court has recently stated that "[r]esort need not be had to a dictionary or case law to recognize the language of contract." *National Railroad Passenger Corp.*, 53 U.S.L.W. at 4290. In describing the relevant statutory language of *United States Trust Co.*, this Court has observed that the State legislators "explicitly bound themselves in a covenant not to take certain actions now or in the future, and the intent to make a contract was, as a result, not even contested in that case." 53 U.S.L.W. at 4290. Here the word chosen by the legislature was "pledge," not "covenant," but the promissory meaning is no less clear. If there were any ambiguity, the statutory reference to "the faith and credit of the State of New York" would remove it. No dictionary is needed here, either, to recognize that a contract was intended.

2. A substantial impairment of contractual obligations has occurred

There can be little doubt that the State has impaired its own promises. The State has done precisely that which it promised it would not do—it has taken money from the Funds, which it promised to hold "separate and apart from all other state moneys," and deposited it in the state treasury.

The State's impairment of its promises was substantial. *See United States Trust Co.*, 431 U.S. at 21. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group, Inc.*, 103 S.Ct. at 705, citing *United States Trust Co.*, 431 U.S. at 26-27. Therefore neither the fact that some assets remain in the Funds nor the existence of the "dry appropriations" protects the State's action. Appellants were entitled to their expectations that the assessments paid into the Funds, and the interest earned on those assessments, would be kept safe and apart from other state money. Those expectations have now been

destroyed. *See United States Trust Co.*, 431 U.S. at 19 ("As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion.")

The State's substitution of a statement, in the form of "dry appropriations," that it will repay the Funds when and if they become bankrupt does not cure the impairment. As pointed out above, an unsecured and revocable statement that money will be paid in the future is not an "arguably comparable security provision," mentioned in *United States Trust Co.* as bearing on the substantial impairment issue. Had this sort of conditional appropriation been thought comparable to the Funds themselves, the legislature need not have set up the Funds in the first place. It could instead, with no impact on its budget, have conditionally "appropriated" money for the payment of claims against insolvent insurers when the money was needed. It chose instead to create the Funds, using statutory language obviously designed to evoke the maximum degree of trust and reliance from the insurance industry and the public. It should not now be heard to say that its total disregard of its own promises is "insubstantial."

3. The impairment was neither reasonable nor necessary

The general rule regarding impairment of private contracts is that an impairment "may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25. As noted above, however, this Court, notwithstanding the usual presumption of constitutionality, applies a heightened scrutiny to impairments of contract when a State's own contractual obligations are involved. In a statement especially appropriate in this case, the Court has held that in those circumstances,

> complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes

> do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co., 431 U.S. at 25-26 (footnote omitted). *See Perry* v. *United States*, 294 U.S. at 350-351; *Lynch* v. *United States*, 292 U.S. at 580 (need for money is no excuse for repudiating contractual obligations).

No doubt the balancing of New York State's budget may reasonably be regarded as "an important public purpose." But at the time of the passage of Chapter 55, no financial emergency or other exigent situation had been declared to justify the legislature's action. The legislature simply found it convenient to take the very assets that it had earlier pledged to leave in "safekeeping." If the State were free to make this choice, truly "the Contract Clause would provide no protection at all."

What makes the action taken here by the New York legislature especially unpalatable is its arbitrariness. Appellants, like the bondholders in *United States Trust Co.*, made easy targets for the legislature. See Note, 89 Yale L.J. at 1650. They had already placed their trust in the State and relied on its promise to keep the Funds safe. There is at best something distasteful about the idea of balancing the State's budget with money the State had promised to keep safe for the benefit of policyholders and beneficiaries of property, liability and workers' compensation insurance; but the State chose this approach because the obvious alternative means of budget-balancing—cutting spending and raising taxes—were politically unpalatable.

The State has not suggested at any stage of this case any reason, other than political expediency, why such conventional methods as tax increases or spending cuts were not adopted to balance the State's budget. Clearly it was not necessary to

contradict statutory pledges and take money from the Funds in order to achieve the end the State sought.

* * *

Chapter 55 raises substantial constitutional questions under the Contract Clause.

CONCLUSION

Probable jurisdiction should be noted.

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May 1985

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

AMERICAN INSURANCE ASSOCIATION, et al.,

v.

RODERICK CHU, as Commissioner of Taxation and Finance of the State of New York, et al.

Argued January 2, 1985

Decided February 21, 1985

Before WACHTLER, C.J., and JASEN, SIMONS, MEYER and KAYE, JJ. ALEXANDER, J. took no part.

MEYER, J.

The "justiciable controversy" upon which a declaratory judgment may be rendered requires not only that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action but also that the controversy involve present, rather than hypothetical, contingent or remote, prejudice to plaintiffs. Because the controversies involved in the present action are not ripe for determination, the order of the Appellate Division should be modified by striking the declaration and dismissing the complaint and, as so modified, should be affirmed, without costs.

The purpose of the present action is to obtain judgment declaring unconstitutional section 92 of chapter 55 of the Laws of 1982, insofar as it directs transfer into the state's general fund of $50 million from the Aggregate Trust Fund (ATF), $67 million from the Stock Workers Compensation Fund (SWCF) and $87 million from the Property and Liability Insurance

Security Fund (PLIS) and enjoining such transfers or requiring return of the funds if transferred. The ATF, established by Workers' Compensation Law, section 27, is a fund into which an employer or compensation carrier may (in some cases must) pay the present value of future periodic benefits payable to compensation claimants and be thereby discharged from further liability to the claimant. Workers' Compensation Law, section 27(6) provides that the fund "shall be kept separate and apart from all other moneys of the state fund." The SWCF, established by article 6-A of the Workers' Compensation Law, was created to protect those entitled to compensation benefits against the insolvency of a stock insurer. It is funded by payments from stock carriers, which are, however, suspended once the fund reaches $84 million (Workers' Compensation Law, § 109). The PLIS, created by Insurance Law, section 334, serves a similar function with respect to specified types of property and liability insurers, is funded by payments from such carriers, and contains a similar provision suspending carrier payments. As to both the SWCF and the PLIS, the governing statute directs that the fund "shall be separate and apart from any other fund and from all other state moneys, and the faith and credit of the state of New York is pledged for its safekeeping" (Workers' Compensation Law, § 109-b[1]; Insurance Law, § 333[6]).

Sections 84, 88 and 90 of chapter 55 make "dry appropriations" to each of the three funds equal to or greater than the amount transferred under section 92 and provide in each case that the appropriation thus made "shall be deemed an asset" of the fund and that the transfer from the fund to the state's general fund shall be deemed a prudent investment. The "dry appropriation" requires inclusion in each year's budget bill for the next fiscal year of an amount equal to the amount transferred by each fund to the state's general fund and provides that if in any year the Governor fails to do so or the Legislature fails to appropriate the specified amount, the amount appropriated for the preceding fiscal year be paid forthwith to the fund. Section 93 of the act requires that any action relative to the foregoing be brought against the state and holds harm-

less every state officer, as well as persons employed by or who advise such an officer, from liability by reason of the transfers directed or actions mandated by other provisions of the act. Chapter 404 of the Laws of 1982 made the necessary appropriations to each of the three funds for 1982, but provided as to the SWCF and PLIS that no expenditure be made from the appropriation if other assets of the fund are available, and as to the ATF that no expenditure be made if other assets not part of reserves for claims or losses are available.

The plaintiffs are three trade associations of insurance companies, 13 property and casualty insurers, two policyholders of such insurers, and three beneficiaries of the ATF. The defendants are the Acting Commissioner of Taxation and Finance, custodian of the PLIS and SWCF, the Superintendent of Insurance, who is charged with administering those two funds, and the Commissioners of the State Insurance Fund (SIF), who are custodians of and charged with administration of the ATF. The SIF Commissioners served an answer containing a cross-claim asking that the court declare whether chapter 55 as it relates to the ATF is constitutional. The other two defendants served a separate answer alleging a number of affirmative defenses, including that the complaint lacked specificity as to the nature and extent of plaintiffs' injury.

Plaintiffs moved for summary judgment and defendants other than the SIF Commissioners cross-moved for like relief. The papers on the cross-motion established, and plaintiffs do not dispute, that the ATF, after transfer of the $50 million to the general fund, will still have $13 million in surplus funds over and above all claims, expenses and reserves; that the PLIS held $212 million and would on February 1, 1983 receive an additional $21 million and since 1977 had annual income in excess of the claims submitted in any year; and that the SWCF had a balance of $78 million before transfer pursuant to chapter 55 and in the 50 years of its existence had only been required to pay claims totalling $2 million. Special Term, holding that, "No real and present controversy exists," denied plaintiffs' motion, granted defendants' cross-motion and dismissed the complaint. On appeal the Appellate Division con-

cluded that plaintiffs had standing but that chapter 55 was constitutional and, therefore, modified Special Term's order to so declare and to strike the provision dismissing the complaint.

The declaration against plaintiff should be stricken and the complaint dismissed.[1] That plaintiffs may have sufficient interest in the funds to be accorded standing to maintain the action is but part of the equation. The action is premature and as a matter of law may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur (*Combustion Eng.* v. *Travelers Ind. Co.*, 53 N.Y.2d 875, *affg.* 75 A.D.2d 777; *New York Public Interest Research Group* v. *Carey*, 42 N.Y.2d 527; *Park Ave. Clinical Hosp.* v. *Kramer*, 19 N.Y.2d 958, *affg.* 26 A.D.2d 613; *Prashker* v. *United States Guar. Co.*, 1 N.Y.2d 584; see Borchard, The Declaratory Judgment, pp. 56-58; Anderson, Actions for Declaratory Judgments [2d ed], § 9, pp. 50-51). That the balance in each of the funds has been reduced by the transfers directed by section 92 creates no risk that plaintiffs paid from the ATF will not be paid or that the plaintiffs interested in the other two funds will be left unprotected by insolvency of a carrier in view of the appropriations made by sections 84, 88 and 90 and by chapter 404. Plaintiffs argue that they are insufficiently protected because a subsequent legislature may omit the required appropriation for a given year and repeal both the prior year's appropriation and the provisions of chapter 55 directing that annual appropriations be made. The possibility of that combination occurring, however, is just such a future event beyond the control of the parties to the action which may never occur as the above cited cases put beyond the reach of a declaratory judgment. Moreover, the

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1 We have not overlooked the fact that the Acting Commissioner of Taxation and Finance and the Superintendent of Insurance are nonappealing parties, and would not be entitled to affirmative relief were this not a declaratory judgment action (see *Hecht* v. *City of New York* (60 N.Y.2d 57). The relief granted here is incidental to the restraint upon the Court against rendering an advisory determination. Having concluded that the controversy is nonjusticiable, the Court cannot allow the declaration to stand.

possibility that because the SWCF and PLIS will, as a result of the transfers, be earning less interest, plaintiffs may be required to contribute additional monies to those funds is nothing more than speculation in light of the history of the funds. Finally, neither *United States Trust Co.* v. *New Jersey* (431 U.S. 1) nor *Patterson* v. *Carey* (41 N.Y.2d 714), relied on by plaintiffs, requires a different conclusion. Neither dealt with the issue of ripeness, but on that question the Supreme Court's notation that there was an impairment of contract because the repealed covenant was not "replaced by an arguably comparable security provision" (431 U.S. at 19) appears, by analogy, to support the conclusion here reached.

Accordingly, the order of the Appellate Division should be modified by striking the declaration and dismissing the complaint and, as so modified, should be affirmed, without costs.

* * * * *

Order modified in accordance with the opinion herein and, as so modified, affirmed, without costs. Opinion by Judge Meyer. Chief Judge Wachtler and Judges Jasen, Simons and Kaye concur. Judge Alexander took no part.

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

No. 17815

AMERICAN INSURANCE ASSOCIATION, et al.,

—against—

ROBERT W. BOUCHARD, et al.

Decided June 26, 1984

Before SANDLER, J.P., and SULLIVAN, ROSS, ASCH, and ALEXANDER, JJ.

Order, Supreme Court, New York County (Gammerman, J.), entered July 5, 1983, which, *inter alia*, granted the defendants' cross-motion for summary judgment dismissing the complaint, unanimously modified, on the law, without costs or disbursements, to declare chapter 55 of the Laws of 1982 constitutional and to strike the provision finding the controversy nonjusticiable and, except as thus modified, affirmed.

Special Term dismissed this declaratory judgment action challenging the constitutionality of chapter 55 of the Laws of 1982 which, *inter alia*, provided for the transfer of $204,000,000 into the General Fund from the Property and Liability Insurance Security Fund, the Aggregate Trust Fund and the Stock Workmen's Compensation Security Fund, on the ground that a justiciable controversy did not exist. Plaintiffs are three trade associations of insurance companies, 13 property and casualty carriers and two policyholders of such insurance and three Aggregate Trust Fund beneficiaries. In so ruling Special Term found that since plaintiffs did not suffer immedi-

ate financial loss through increased premiums or failure of the State to pay claims they are not injured by chapter 55. Apparently, Special Term confused two issues, namely, the merits of the complaint and the right, in the first instance, to bring a declaratory judgment action. Whatever the merits of their complaint, plaintiffs, who present State constitutional claims, have standing to challenge the constitutionality of chapter 55. In *Boryszewski* v. *Brydges* (37 N.Y.2d 361, 362), the Court of Appeals expanded standing to include any taxpayer who challenges State legislative enactments "as contrary to the mandates of our State Constitution." The assets of the trust funds involved, which trusts were intended to secure the obligations of insurers to policyholders and beneficiaries in case of insolvency, were supplied by the very insurance companies who sue here. The plaintiffs' standing is clear. As for the merits, we find and declare chapter 55 to be constitutional in accordance with the opinion rendered in *Methodist Hosp.* v. *State Ins. Fund* (102 A.D.2d 367). We have considered the so-called differences between the State Insurance Fund in *Methodist Hosp.* and the three funds involved here and conclude that they do not justify any different result.

Order filed.

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 26, 1984

Present:

Hon. Leonard H. Sandler, *Justice Presiding*

Joseph P. Sullivan
David Ross
Sidney H. Asch
Fritz W. Alexander, II, *Justices.*

AMERICAN INSURANCE ASSOCIATION, et al.,

—against—

ROBERT W. BOUCHARD, et al.

No. 17815

An appeal having been taken to this Court by the plaintiffs-appellants from an order of the Supreme Court, New York County (Ira Gammerman, J.), entered on July 5, 1983, which, *inter alia*, granted the defendants' cross-motion for summary judgment dismissing the complaint,

And said appeal having been argued by Robert S. Smith of counsel for appellants, by Harold L. Fisher and Gerald Gorinsky of counsel for respondents, other than Acting Commissioner Bouchard, Superintendant Lewis and Lillian Roberts, by Richard G. Liskov of counsel for Roderick Chu, present Commissioner of Taxation and Finance and James P. Corcoran, present Superintendent of Insurance of the State of

New York, and a brief having been submitted as Amicus Curiae on behalf of New York State AFL-CIO by Richard L. O'Hara, Robert A. Kennedy, and David Westermann, Jr. of counsel; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is modified, on the law, without costs and without disbursements, to declare Chapter 55 of the Laws of 1982 constitutional and to strike the provision finding the controversy nonjusticiable and, except as thus modified, affirmed.

ENTER:

JOSEPH J. LUCCHI
Clerk of the Court

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL TERM PART I, NEW YORK COUNTY

AMERICAN INSURANCE ASSOCIATION, et al.

—against—

ROBERT W. BOUCHARD, as Acting Commissioner of Taxation and Finance of the State of New York; et al.

No. 91531/82

GAMMERMAN, J.:

In this action for declaratory and injunctive relief, plaintiffs move, and defendants cross-move for summary judgment. Plaintiffs seek a declaration that Chapter 55 of the Laws of 1982 is unconstitutional. Defendants seek an opposite declaration.

As part of Ch. 55, the Legislature directed that $50 million be transferred from the Aggregate Trust Fund ("ATF"), $67 million transferred from the Stock Workers Compensation Fund ("SWCF"), and $87 million be transferred from the Property and Liability Insurance Security Fund ("PLIS") to the State General Fund. The ATF and the SWCF were operated under provisions of the Workers' Compensation Law ("WCL"). The PLIS was operated pursuant to the Insurance Law. These statutes were also amended by the Laws of 1982 (Ch. 55) and a structure set up to have such transfers made on an annual basis. The legislation also provided for an annual appropriation to the three funds in a sum equal to the transfers to the General Fund if no other assets of the funds were available to make required payments. (See Ch. 404 L. 1982). It was expressly the intent of the legislation to maintain the solvency of these funds.

Chapter 55 provides a "dry" appropriation to each of the Funds in the amount taken from the Fund. A dry appropriation is a device whereby the legislature provides that it will return the money transferred if and when it is needed after the exhaustion of the Funds. The dry appropriations are not effective if any other assets of the Funds are available to pay claims. Chapter 55 provides that, if the legislature fails in any future year to make such a contingent appropriation for money to replace the amount transferred, the previous year's appropriation is to be paid into the Fund. (Chapter 55, § 90.)

The PLIS (see Ins. Law §§ 333 and 334) was established to protect persons entitled to payments under certain kinds of property and liability policies by paying their claims if their insurers became insolvent. The Fund's assets are supplied by insurers writing policies within the State.

The SWCF was established by §§ 107-109 of the WCL. It is funded by carriers writing Workers' Compensation policies in New York. It was established to protect beneficiaries of certain payments under the WCL in the event the responsible carrier became insolvent.

The purpose of the Aggregate Trust Fund, established by WCL § 27, is to secure periodic payment awards of death benefits or other compensation made under the Workers' Compensation Law. An insurer responsible for any such award pays its present value into the Fund, which then assumes responsibility for periodically compensating the person entitled to payments. The Commissioners of the State Insurance Fund are custodians of the Aggregate Trust Fund.

All three of the Funds [are] classified as "fiduciary funds" by the Comptroller of New York State. [Office of the State Comptroller, Report to Governor and Legislature: Recommendations for Fund Classification and Changes to Existing Statutory and Non-Statutory Fund Structure 42 (October 31, 1981).]

Each of the above cited statutes provides in one form or another that the fund shall be separate and apart from any other fund, and from all other state money.

All three funds are managed by defendant Superintendent of Insurance. Defendant Commissioner of Taxation and Finance is the custodian of the funds.

Plaintiffs include three trade associations of insurance companies, thirteen companies engaged in writing relevant lines of property and casualty insurance, two policyholders of such insurance, and three beneficiaries of the ATF.

Plaintiffs argue that by transferring money from the Funds, the legislature has forced plaintiffs and other insurers, policyholders, and beneficiaries to bear a substantially increased risk that the assets of the fund will not be available when needed for their intended purposes. Consequently, plaintiffs argue they need not wait to seek judicial relief until any one of the funds fails to meet its obligations to pay claims, because the increased risk passed on to plaintiffs and others constitutes the very harm that the Funds were designed to prevent.

They contend that the so called "dry appropriations" do not remedy the evil done by Chapter 55's transfer of the assets of the Funds. Plaintiffs believe they are entitled to the protection which was "pledged" to them by statute—the protection of fiduciary funds, kept "separate and apart" from other State money. [They] maintain that having broken its former promise, the State has substituted a new and lesser promise: to pay the money back when it is needed. This promise, too, plaintiffs fear may be broken. A subsequent legislature may short-circuit the entire scheme by not only omitting the current year's appropriation, but also by repealing the prior year's appropriation. The portions of the 1982 legislation calling for annual appropriations might also be repealed by a later legislature.

The plaintiffs contend that the "dry appropriations" are nothing but a device, designed to create the illusion that the State has not broken its promises or taken plaintiffs' property. In the eyes of the plaintiffs, the State has in fact done both.

The defendants describe their functions with respect to the Funds as the execution of a part of the State sovereign governmental operations and the implementation of public policy. They point out that the challenged legislation is not the

first instance of the enactment of laws affecting the disposition of the Funds.

It is pointed out by the defendant Albert B. Lewis that there is no reason to suspect that Ch. 55 would render the Funds insolvent or incapable of fulfilling their statutory function.

Evidence submitted in support of the Superintendent's affidavit indicates that:

ATF has a $63 million surplus, i.e., money not allocated for claims, expenses or reserves, of which $50 million will be transferred under Chapter 55.

SWCF, has a value in excess of $78 million of which $67 million will be transferred. The *total* amount paid out from SWCF, in the nearly fifty years of its existence, is less than $2 million and no more than $578,000 has ever been paid from SWCF in any one year.

PLIS has had so much investment income that $32 million had already been transferred prior to enactment of Chapter 55 without the slightest adverse impact on that Fund's operation (see e.g. L. 1979 Ch. 503). Moreover, each year for the past five years, the amount of PLIS annual income has exceeded the amounts paid to beneficiaries of carriers which became insolvent without using any of the $171 million in original contributions from the carriers.

It is defendants' position that, based upon the Funds' current values, the amounts to be transferred, the extent of present and foreseeable claims, and the express legislative provisions for maintaining each Fund, there is simply no evidence that any compensation beneficiary or casualty insurance claimant will be denied payment because of Chapter 55.

Turning first to defendants' argument that plaintiffs are unable to cross the threshold of CPLR 3001, the court agrees. The plaintiffs have not demonstrated the existence of a justiciable controversy.

The totality of plaintiffs' argument is founded upon speculation and apprehension. There is no showing of present injury or pending future injury. The argument is devoid of any evidence that the plaintiff insurance associations or insurance

companies are or will be affected by Ch. 55. The payments of the carriers or their insureds (viz. premiums) remain unchanged by Ch. 55. Neither does the legislation effect the remuneration of beneficiaries (named as plaintiffs or otherwise). It has been and remains the obligation of the defendants to collect and administer the funds and pay the beneficiaries.

Plaintiffs' alarm or worry about a "substantially increased risk" that the assets will not be available does not create a justiciable controversy ("substantially increased risk" presupposes that a "risk" always existed in any event) (see *N.Y.P.I.R.G.* v. *Carey*, 42 N.Y.2d 527). It is inappropriate or impermissible or both for the court to render a declaration regarding the effect of an occurrence where only a risk (substantially increased or otherwise) exists as to its occurring. (*Combustion Engineering Co.* v. *Aetna*, 75 A.D.2d 777, *aff'd* 53 N.Y.2d 875).

No real and present controversy exists. There is only plaintiffs' worry that perhaps someday, they could possibly be harmed. Consequently, no justiciable controversy exists.

Plaintiffs' motion is therefore denied and defendants' motion is granted. The complaint is dismissed.

The foregoing constitutes the decision and order of the court.

Dated: June 30, 1983

/s/ Ira Gammerman
IRA GAMMERMAN
Justice of the Supreme Court

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM PART I, NEW YORK COUNTY

County Clerk's No. 91531/82

Present:

Hon. IRA GAMMERMAN,

Justice

AMERICAN INSURANCE ASSOCIATION, et al.

—against—

ROBERT W. BOUCHARD, et al.

The following papers numbered 1 to 10 read on this motion, argued No. 61 on Calendar of [February 18, 1983]:

> Notice of Motion and Affidavits Annexed, Ex. 1-3; Superintendent of Insurance Answering Affidavit and Cross-Motion, and defendants Fischer et al. Answering Affidavit, Ex. 4-10;

Upon the foregoing papers this motion is decided is accordance with accompanying memorandum decision.

/s/ Ira Gammerman
IRA GAMMERMAN
Justice of the Supreme Court

Dated: 6/30/83

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

No. 17436

METHODIST HOSPITAL OF BROOKLYN, et al.,

—against—

STATE INSURANCE FUND, et al.

Decided June 26, 1985

Before

CARRO, J.P., and FEIN, MILONAS,
KASSAL and ALEXANDER, JJ.

ALEXANDER, J.

By the enactment of chapter 55 of the Laws of 1982, the Workers' Compensation Law was amended to mandate that the State Insurance Fund (SIF or Fund) transfer $190 million dollars to the general fund of the State by March 1, 1983, and to provide for future transfers. A new section 87-f of the Workers' Compensation Law provided for an annual "dry appropriation" of $190 million dollars for each year after 1983. The SIF would include the $190 million dollars in its budget request and the Governor was required to include the request in his budget bill. The $190 million dollars would be appropriated for the SIF in the State budget, but none of this appropriation would be actually paid, unless the following year's State budget failed to make the same appropriation. The amendment further provided that such appropriation was to be deemed an "admitted asset of the State Insurance Fund" (Workers' Compensation Law, § 87-f, subd. 2) and any transfer of moneys by the State Insurance Fund to the State's

general fund was to be deemed a "proper and prudent legal undertaking for any state officer with responsibility for the custody and investment of the assets of the fund . . ." (Workers' Compensation Law, § 87-f, subd. 2). Other provisions of chapter 55 immunized and indemnified State officers from liability for such transfers.

In order to maintain the solvency of SIF following the transfer of these moneys to the general fund, chapter 404 of the Laws of 1982 provided, among other things, for the first $190 million dollar appropriation. None of this appropriation could be expended, however, if other assets of SIF, which were not part of reserves for claims or losses, were available. Moreover, a certificate of approval had to be issued by the Director of the Division of the Budget in order for any expenditures to be made from such appropriation.

The plaintiffs, Methodist Hospital of Brooklyn (Methodist), Accident Prevention & Safety League, Inc. (Accident), and Nagel, Inc., are employers insured by SIF under workers' compensation insurance policies. In a declaratory judgment action commenced in April, 1982, they challenged the constitutionality of this legislation on several Federal and State grounds. They allege that it constitutes an impairment of their contractual obligations with the SIF and thus violates section 10 of article I of the United States Constitution; that it provides for a taking of private property without due process of law in contravention of the guarantee of the Fourteenth Amendment to the United States Constitution and section 6 of article I of the State Constitution; that it constitutes an unlawful intrusion upon the discretion of State officials in violation of section 3 of article V of the State Constitution; that it constitutes a loan or gift of the State's credit in violation of section 8 (subd. 1) of article VII of the State Constitution; that the legislation creates a debt of the State in violation of sections 9 and 11 of Article VII of the State Constitution; and that the legislation constitutes an unlawful appropriation scheme in violation of section 7 of article VII of the State Constitution. They also contend that because interest will not

be paid on the transferred funds, SIF's income will be lowered, resulting in a loss to the Fund. In order to offset such loss, they argue, SIF will have to raise premiums to policyholders, which raises would constitute a *de facto* tax that violates section 22 of article III of the State Constitution.

The action is brought against the State Insurance Fund, its Commissioners, its Executive Director and its Supervising Actuary (collectively, the Fund or SIF) and also against the State of New York and the Commissioner of Taxation and Finance (collectively, the State). The State answered denying the constitutional challenges alleged by plaintiffs. SIF's answer essentially denies information and belief with respect to the constitutional challenges alleged in the complaint as well as the cross-claims against the State for a declaratory judgment as to the constitutionality of chapters 55 and 404 of the Laws of 1982.

Following joinder of issue, plaintiffs moved for summary judgment. SIF joined in and supported that motion. In addition to adopting the arguments advanced by plaintiffs, SIF asserted that its funds are "fiduciary funds" under State law and that their policies of insurance constitute contracts under which the policyholders have present, tangible and vested property interests which are held for the benefit of the insureds. The State cross-moved for summary judgment. In a thoughtful and careful opinion, Special Term denied the plaintiff's motion and granted the State's cross-motion, declaring chapters 55 and 404 of the Laws of 1982 constitutional (117 Misc. 2d 178). We agree and therefore affirm.

We begin our discussion, as did Special Term, with the acknowledgement that "[t]here is a simple, but well founded, presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt (*Montgomery* v. *Daniels*, 38 N.Y.2d 41; *Matter of Malpica-Orsini*, [36 N.Y.2d 568])." (*Hotel Dorset Company* v. *Cultural Resources*, 46 N.Y.2d 358, 379.) "The burden of showing the unconstitutionality of a statute, or [*sic*] course rests on the party which attacks its validity (*Matter of Van Berkel* v. *Power*, 16 N.Y.2d 37, 40) and every legislative

enactment carries a strong presumption of constitutionality (*Borden's Co.* v. *Baldwin*, 293 U.S. 194, 209; *Patterson* v. *University of State of N. Y.*, 14 N.Y.2d 432, 438)". (*Cook* v. *City of Binghamton*, 48 N.Y.2d 323, 330.) Indeed, as Judge Cooke (now Chief Judge) pointed out in his dissent in *Sgaglione* v. *Levitt* (37 N.Y.2d 507, 513) "Every legislative enactment is clothed with an exceedingly strong presumption of constitutionality (* * *) accompanied by a further presumption that the legislature has investigated and found facts necessary to support the legislation (* * *) The party alleging unconstitutionality has a heavy burden, one of demonstrating the infirmity beyond a reasonable doubt, and only as a last resort will courts strike down legislative enactments on the ground of unconstitutionality."

Critical to the validation of plaintiffs' claims of unconstitutionality is a determination of the status of the State Insurance Fund and the nature of the interest, if any, of the plaintiff in the surplus moneys of the Fund.

It is clear, as the courts have consistently held, as the Legislature no doubt was well aware, that the State Insurance Fund is a State agency. After considering the purposes and functions of the Fund in the light of its origin and development and examining the structure of the Fund, this court, long ago, concluded that the Legislature intended to shelter the Fund beneath the mantle of the State's sovereign immunities, and held that "the inextricable meshing of the fund into the basic administration of the Workmen's Compensation Law and its control and direction by the State, reflect a legislative intent to make the fund a State agency with the sovereign powers claimed [by the State Insurance Fund]". (*Matter of State Ins. Fund* v. *Boyland*, 282 A.D. 516, 523, *aff'd no opn*, 309 N.Y. 1009.) And while it may be true that *Boyland* concerned a somewhat narrow question of whether or not the property of the Fund was exempt from property tax, we noted in *Boyland* (at p. 524) that "A number of decisions have held, in various contexts, that the fund is a State agency". We cited *Cardinal* v. *State of New York* (304 N.Y. 400 [holding that an action on an insurance policy issued by the State Insurance Fund was

properly brought against the State itself, in the Court of Claims]) and *Skakandy* v. *State of New York* (188 Misc. 214, *aff'd* 274 App. Div. 153, *aff'd* 298 N.Y. 386 [holding that tort actions against Commissioners of the State Insurance Fund must be brought in the Court of Claims because such Commissioners are officials and agents of the State].) (See also *Cahill* v. *Tremaine*, 245 AD 773, *aff'd no opn*, 269 N.Y. 573 [compensation of SIF employees subject to legislative reduction since paid from State moneys]; *Commissioners of State Ins. Fund* v. *Rosenshield*, 179 Misc. 180 [SIF not subject to suit in Municipal Court because it is a State agency]; *Commissioners of State Ins. Fund* v. *Lapidus*, 182 Misc. 368 [Former Civ. Prac. Act, § 292-a inapplicable to require examination before trial of SIF, a State agency]; *Commissioners of State Ins. Fund* v. *Dinowitz*, 179 Misc. 278 [SIF Commissioners entitled to trial preference because of State officer status]; *Solomon* v. *Kennedy*, 38 Misc. 2d 1090 [SIF cannot be impleaded in Supreme Court because it is a State agency]).

Appellant's citation to *Commissioners of the State Ins. Fund* v. *Low* (3 N.Y.2d 590) to support the argument that the Fund should not be considered a State agency in the context of the present litigation is not persuasive.

As made clear in that case by the Appellate Division: "[T]he legislature considered the fund to be the real owner of any subrogated action" and "intended the fund to be treated *for all insurance purposes* the same as a private carrier." (*Commissioners of State Ins. Fund* v. *Low*, 285 App. Div. 525, 528, 529; emphasis added.) The Court of Appeals, in affirming the denial of the motion to dismiss the Fund's complaint, based on a collateral estoppel defense, observed that "while it is not a separate corporation and while it is an agency of the State in one sense [the Fund] is nevertheless treated by the statutes as a separate insurance business * * * and that, especially in *litigations*, it is to be considered an entity separate from the State itself." (*Commissioners of State Ins. Fund* v. *Low*, 3 N.Y.2d 590, 595, emphasis added). In the circumstances of that case, the Court of Appeals appropriately found (p. 596) that there

was "no particular pertinence here of *Matter of State Ins. Fund* v. *Boyland*, (300 N.Y. 1009)".

We treat with the Fund here, however, not for "insurance purposes" or "in litigation" as the owner of a subrogated claim, but rather, in respect to the exercise of the sovereign power of the State in respect to a State agency. Indeed the very nature and structure of the SIF bespeaks of its identity as a State agency. All of its eight Commissioners, including the *ex officio* members, the State Commissioner of Labor and the State Commissioner of Health, are appointed by the Governor, with the advice and consent of the Senate. All of its top executive officers, the executive director, the general attorney, the secretary and medical director are members of the exempt class of civil service and are appointed by the Commissioners for fixed terms. All other employees are subject to civil service requirements in respect to appointment, promotions and transfers. (*cf., Collins* v. *Manhattan & Bronx Surface Tr. Operating Auth.*, 62 N.Y.2d 361.) The Commissioner of Taxation and Finance is the custodian of the moneys and investment assets of the Fund and has the authority to deposit any portion of the Fund's moneys, not needed for immediate use, in the manner and subject to all provisions of law respecting the deposit of other State funds.

Moreover, there can be no doubt "that the Workmen's Compensation Law blueprints the administration of an indubitable governmental function, and that the Fund is a primary and essential actor in such administration." (*Matter of State Ins. Fund* v. *Boyland, supra*, p. 521). The statutory provisions respecting the composition of the Fund, discussed above, and the further requirement of the submission of quarterly estimated budgets by the Fund to the Director of the Budget for his approval with the additional requirement of his approval for administrative expenditures in excess of those specified in the budget, the requirement that none of the funds of the SIF may be paid, expended or refunded except upon audit by the Comptroller, make clear that "the Legislature intended to integrate the fund as a necessary and integral part of a carefully planned and developed structure for the administra-

tion of the Workmen's Compensation Law; and that it designedly lodged this entire structure in the State Department of Labor." (*Matter of State Ins. Fund* v. *Boyland*, 282 App. Div. 516, 523, *supra*.)

Any residual doubt as to the status of SIF as a State agency subject to the broad scope of the Legislature's power to enact laws concerning workers' compensation, is dispelled by section 18 of article I of the New York Constitution which provides, in pertinent part, "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health or safety of employees" (*Crosby* v. *State of New York Workers' Compensation Board*, 57 N.Y.2d 305; *Matter* of *Schmidt* v. *Wolf Contr. Co.*, 269 App. Div. 201 *aff'd* 295 N.Y. 748, *Barrencotto* v. *Cocker Saw Co.*, 266 N.Y. 139, *Matter of Gormeley* v. *N.Y. Daily News*, 30 A.D.2d 16, *aff'd* 24 N.Y.2d 867). And indeed, the Legislature has heretofore exercised its power over the SIF and the disposition of moneys of the Fund. The SIF was required by legislative enactment in 1975 to invest its funds in obligations of the New York City Municipal Assistance Corporation, the City of Yonkers and certain State public benefit corporations. (See Workers' Compensation Law §§ 87-a, 87-b, and 87-c). These mandated investments have never been challenged and reinforce the fact that SIF funds are State funds (*Matter of Cahill* v. *Tremaine*, 245 App. Div. 773, *aff'd no opn*, 269 N.Y. 573 *supra*) subject to the control of the Legislature. The fact that these legislative mandates referred to "investments" of SIF funds, as opposed to a transfer to the general fund, in no way diminishes the power of the Legislature to exercise control of SIF and its funds.

Plaintiffs argue, however, that even if the SIF is a State agency, the challenged legislation is nonetheless an outright seizure of funds held by the State in a "fiduciary" capacity, which are not raised by taxation, but are funds in which they, as policyholders, have a beneficial property interest deriving both from their policies of insurance and the specific covenants set forth in the Workers' Compensation Law. Thus, they

contend that the challenged legislation takes their property without compensation in contravention of the Fourteenth Amendment to the U.S. Constitution and section 6 of article I of the New York State Constitution, impairs their contractual obligations with SIF and violates various other provisions of the New York State Constitution.

Special Term appropriately rejected these arguments, as do we. Turning first to the arguments addressed to claimed violations of the New York State Constitution, we observe that the sweep of section 18 of article I of the State Constitution is extraordinarily broad and has been held to insulate the Workers' Compensation Law and legislative enactments in respect thereto from claims of violations of other provisions of the State Constitution. (*Crosby* v. *State of New York, Workers' Compensation Board, supra*; *Matter of Schmidt* v. *Wolf Contr. Co., supra*; *Barrencotto* v. *Cocker Saw Co., supra*; *Kontrakos* v. *Long Is. Coll. Hosp.*, 47 A.D.2d 500, *aff'd* 39 N.Y.2d 1026.) In addition, it has long been clear that the Legislature retains broad powers over the Executive under the State Constitution subject to such limitations as are specifically set forth in the Constitution (art. V § 3; *Stanton* v. *Board of Supervisors*, 191 N.Y. 28) none of which limitations are violated by the challenged legislation.

Thus, the claim that chapters 55 and 404 implicitly create a loan or gift of the State's credit in violation of section 8 (subd. 1) of article VII of the State Constitution is without merit. Initially, it is noted that the Fund is not an "individual or public or private corporation or association or private undertaking" (N.Y. Const., art. VII § 8 subd. 1). Moreover, as pointed out earlier, the Fund is itself a State agency. Therefore, this provision does not apply to it. (*Board of Supervisors of Cayuga County* v. *State of New York*, 153 N.Y. 279.) The Court of Appeals pointed out in *Wein* v. *Levitt* (42 N.Y.2d 300), at p. 306, that: "That provision [N.Y. Const., art. VII, § 8, subd. 1] seeks to prevent the State from loaning its credit to a public corporation with the concomitant possibility that the State might ultimately pay the corporation's obligations."

The contention that chapter 55 creates a debt from the State to the Fund in violation of sections 9 and 11 of article VII of the New York Constitution is likewise without merit. Again, such argument is predicated upon the assumption that the Fund is not a State agency, a contention we have rejected. As recognized by appellants and as articulated by the Court of Appeals in discussing section 11 of article VII in *Wein* (*supra*, at 304–305): "The danger sought to be met by constitutional restrictions [of Article VII] was the overburdening of future generations by the incurring of long-term debt for capital improvements. The danger was first recognized by the practice of subsidizing canal and railroad construction only to have the transportation companies unable later to pay their debts." Thus section 11 specifically provides that "no debt shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein." The provision for the annual appropriation of $190 million dollars to insure the solvency of SIF following the transfer of a like sum to the State's general fund can hardly be equated with "subsidizing a canal or railroad construction" or "the incurring of longterm debt for capital improvement".

Interestingly, appellants argue that, at the same time that chapters 55 and 404 create an illegal "loan" of the State's credit and a "long-term debt" they also create an "appropriate scheme" violative of section 7 of article VII. That section provides that no money shall be paid from the "State treasury or any of its funds, or any funds under its management, except in pursuance of an appropriation, by law; nor unless such payment be made within two years next after the passage of such appropriation act". The appropriations authorized by the challenged legislation do not in any way violate this provision, since if no appropriation is passed in any future year, the amount appropriated for and encumbered during the preceding fiscal year is to be paid forthwith. Thus, any moneys to be paid under any such appropriation must be paid, if at all, within two years next after the passage of such appropriation action.

Nor does chapter 55 constitute an unconstitutional legislative incursion upon the discretionary powers of State officials with responsibility for the SIF in violation of the New York State Constitution as argued by appellants. Their reliance on *Patterson* v. *Carey* (41 N.Y.2d 714) and *Sgaglione* v. *Levitt* (37 N.Y.2d 507, *supra*) in support of this contention, is misplaced. Indeed, the court in *Patterson* expressly recognized that the Legislature was given the power, under the Constitution to regulate the Comptroller's duties in regard to political subdivisions of the State, but not public benefit corporations. Public benefit corporations are not political subdivisions of the State. (See *Collins* v. *Manhattan & Bronx Surface Tr. Operating Auth.*, 62 N.Y.2d 361, *supra*.) Thus, the Legislature could not constitutionally infringe upon the State Comptroller's exercise of his discretionary power to supervise the financial accounts of the Jones Beach State Parkway Authority, a public authority. So, too, in *Sgaglione*, the issue addressed by the court was the authority of the Legislature to direct and control the Comptroller's discretion in making investments of funds belonging to various State pension and retirement systems in light of the non-impairment provisions of section 7 of article V of the State Constitution. The statutes under attack here do not deal with the investment discretion of the SIF. Rather, they merely direct the transfer of funds internally within the State's financial structure.

Plaintiff-appellant's due process and contract impairment arguments based upon the United States Constitution are equally unavailing to establish the unconstitutionality of chapters 55 and 404.

The SIF funds are State funds and the plaintiffs have no constitutionally protected property interests therein; certainly not merely by reason of the fact that the moneys in the fund derive from premiums paid by employer policyholders and the interest earned thereon. Neither do any such property rights accrue from the fact that SIF funds are classified as "fiduciary funds". Section 70 of the State Finance Law, relied upon by plaintiffs does no more, in this regard, than to direct the

Comptroller to establish "seven fund types" ranging from "(a) a general fund" to "(g) fiduciary funds" into which all State funds were to be classified. (§ 70 State Finance Law, subd. 1, as added by L. 1981, ch 405) Moreover, the Comptroller is authorized to reclassify such funds, as is determined by him to be necessary and appropriate and in connection therewith he is only required to give notice of his actions and the reasons therefor to the Legislature and the Governor. (State Finance Law § 70 subd. 2). Such discretion to classify and reclassify "all funds of the State" which are "not classified by law" into a fund type for "financial reporting purposes" is inconsistent with and totally refutes any claim that classification of these funds as "fiduciary funds" creates a constitutionally protected property right in the SIF funds held by the plaintiffs (State Finance Law, § 70, subd. 1, 2).

Nor do any such property rights derive from any "promises" or "guarantees" contained in the policies of insurance or any provision of the Workers' Compensation Law. The contention of plaintiffs that they possess certain contractual rights in respect to the level of insurance premium rates and in respect to the required amount of reserves and the disposition of such reserves which are impaired by chapters 55 and 404, is not supported by either the facts or the law. Clearly, nothing in the policies of insurance themselves can fairly be interpreted as conferring any such contractual rights. Nor can it reasonably be said that any of the provisions of Workers' Compensation Law establish any such property interest in the funds of SIF nor impose any contractual obligations upon the State in respect to the funds of SIF, which are substantially impaired by the challenged legislation.

The general rule, as enunciated by the Court of Appeals in this regard is that "a statute will itself be treated as a contract when its language and the circumstances manifest a legislative intent to create private rights of a contractual nature enforceable against the State." (*Cook* v. *City of Binghampton*, 48 N.Y.2d 323, 330.) "[B]efore a law may be deemed to amount to a contract between the State and a third party, the statutory

language must be examined and found to be 'plan and susceptible to no other reasonable construction' than that a contract was intended * * * 'It is never to be assumed * * * that the State has * * * fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract as distinguished from a mere act of general legislation; and that such, in the particular instance, was the actual and deliberate intention of the State authorities' " (*Pennsylvania R.R. Co.* v. *State of New York*, 11 N.Y.2d 504, 511).

We find nothing in the language of those provisions of the Workers' Compensation Law relied upon by plaintiffs that constitute "clear and irresistible evidence" that the Legislature intended to "fetter * * * its power in the future" in respect to the uses to be made of SIF funds or in respect to the level of reserves to be maintained for policy claims or premium rates for the policies issued by SIF or the payment of dividends. Premiums to be charged are required to be set at the "lowest possible rates" "consistent with reasonable reserves and a surplus" and "dividends may be credited or paid" or may be declared. This language is clearly permissive, not mandatory, and does not evince a legislative intent to " 'create private contractual or vested rights'." (*Pennsylvania R.R. Co.* v. *State of New York*, 11 N.Y.2d 504, 511 *supra*.)

This language is more reasonably read as declarations of legislative policy rather than "manifest[ing] a legislative intent to create private rights of a contractual nature enforceable against the State" (*Cook* v. *City of Binghamton*, 48 N.Y.2d 323, 329-330 *supra*). That certain benefits may have enured to plaintiffs and other policyholders as a result of the implementation of those policy declarations, does not transform them into contractually created property rights enforceable against the State.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. * * * Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or undertandings that secure certain benefits and that support claims of entitlement to those benefits'' *Board of Regents* v. *Roth*, 408 US 564, 577.

These policy declarations and their implementation " 'may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its view of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in an action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law'." (*Pennsylvania R.R. Co.* v. *State of New York*, 11 N.Y.2d 504, 512, *supra.*)

Nor do we find any language in the Workers' Compensation Law comparable to that found in *Patterson* v. *Carey* (41 N.Y.2d 714) and *United States Trust Co.* v. *New Jersey* (431 U.S. 1) two cases relied upon heavily by plaintiffs, sufficient to warrant finding that private contract rights are created by the Workers' Compensation Law. In both *Patterson* and *United States Trust Co.*, language is used that unmistakably manifests a legislative intent to create private rights of a contractual nature, enforceable against the State. In *Patterson*, the State "covenanted" with the holders of Authority bonds and "pledged to vest the authority with the power to raise tolls" and "not to limit or alter the rights vested in the authority to the detriment of authority bondholders." *Patterson* v. *Carey, supra*, p. 721 (Public Authorities Law §§ 153-b (subd. 5); 158-a).

In *United States Trust Co. (supra)*, both New York and New Jersey "covenanted" that neither State nor the Port Authority of New York and New Jersey would exceed a limit placed on the amount of Port Authority revenues that could be used to pay debts incurred as a result of mass transportation operations. The United States Supreme Court invalidated the repeal of this covenant by both States, holding that the covenant "limited the Port Authority's deficits and thus protected the general reserve fund from depletion * * * Its outright repeal totally eliminated an important security provision and thus impaired the obligations of the State's contract" (431 U.S. at p. 19).

Even if it were found that some level of protected contract interests in the funds of the Workers' Compensation Law were possessed by plaintiffs, their claim of unconstitutional impairment of those contractual interests must nevertheless fail.

The threshold inquiry when considering a contract clause impairment claim is "whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship" (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411; *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244). And "[i]n determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. at 411, *supra*, citing *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 357.) As pointed out earlier, not only has the field of workers' compensation been heavily regulated by the New York State Legislature in the past, the specific subject matter, the disposition of the surplus funds of SIF has been the focus of prior specific legislation. (*See, e.g.*, Workers' Compensation Law §§ 87-a, 87-b, 87-c, 87-d). Thus, the fact "that the [plaintiffs] are operating in a heavily regulated industry" and that "supervision of the industry [has been] extensive and intrusive" (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 413, 414, *supra*) is significant and diminishes the force of the plaintiffs' contract impairment claim. Moreover, the policies issued to the plaintiffs specifically

provide that they are to be construed by reference to the Workers' Compensation Law as it has been amended previously or shall be amended in the future. The conclusion is inescapable therefore that they knew that their contractual rights were subject to alteration by legislative amendments. That being the case, their "reasonable expectations have not been impaired" by chapters 55 and 404. (*Energy Reserves Group* v. *Kansas Power & Light Co., supra*, p. 416.) Moreover, plaintiffs have failed to establish that any impairment that might be found to exist as a result of the enactment of chapters 55 and 404, is in any sense, substantial. While the "severity of the impairment measures the height of the hurdle the State legislation must clear [m]inimal alteration of contract obligations may end the inquiry at its first stage." (*Allied Structural Steel* v. *Spannaus*, 438 U.S. at 245.)

Here, there is no claim or evidence of any retroactive impact of the challenged legislation on any contract rights plaintiffs may possess, and projections of any future premium increase are minimal and assume that there will be no diminution in discounts or dividends to the policyholders. In addition, it does not appear that it is legally required or actuarially necessary for SIF to raise its premiums either to pay expenses and claims or to replenish reserves for those purposes since the transferred $190 million dollars will be taken from surplus, not from reserves.

In short then, plaintiffs have failed to establish that they possess any constitutionally protected contractual rights in respect to the funds of SIF or that such rights as may exist are substantially impaired, if at all, by chapters 55 and 404. We have considered plaintiffs' other arguments and find them equally lacking in merit. Thus, we conclude that plaintiffs have failed to demonstrate any constitutional infirmities in the challenged legislation.

We have also considered their citations to authorities from other jurisdictions, purportedly dealing with a like subject. We find that these authorities are distinguishable in significant respects and therefore substantially inapposite. Initially, it is observed that in none of the cited cases from foreign jurisdic-

tions does it appear that it has been judicially determined that the local counterpart to our State Insurance Fund is a State agency, as is the SIF, exercising a sovereign governmental function constitutionally delegated to it. (*Matter of State Ins. Fund* v. *Boyland,* 282 App. Div. 516, *supra*) Nor does it appear to have been judicially determined either that the funds of the compensation agencies were State funds (*Matter of Cahill* v. *Tremaine,* 245 App. Div. 773, *supra*) or that compensation claims are enforceable against the State itself. (*Cardinal* v. *State of New York*, 279 App. Div. 326, mod. on other grounds 304 N.Y. 400, *supra*; cf. *Moran* v. *State ex rel Derryberry*, 534 P. 2d 1282 [Okla.]). Indeed, in Oregon and Florida, the statutes creating workers' compensation plans explicitly declare that those funds are not State moneys (See *Bennett* v. *State Ind. Acc. Comm.*, 203 Ore. 275, and *State* v. *Florida State Improvement Comm.*, 158 Fla. 743).

We conclude that chapters 55 and 404 of the Laws of 1982 do not affront either the United States Constitution or the Constitution of the State of New York and that Special Term's order declaring them constitutional should be affirmed.

Accordingly, the judgment of the Supreme Court, New York County (William P. McCooe, J.), entered February 24, 1983, which denied plaintiffs' motion for summary judgment and granted defendants, Edward V. Regan, Roderick Chu and the State of New York for summary judgment declaring chapters 55 and 404 of the Laws of 1982 constitutional should be affirmed without costs.

All concur except Kassal, J. who dissents in an Opinion.

KASSAL, J. (dissenting)

I disagree with the conclusion by the majority and find that chapters 55 and 404 of the Laws of 1982, mandating a transfer of $190 million from the State Insurance Fund to the general fund of the State, are unconstitutional, amounting to a deprivation of property without due process and a taking of private

property for public purpose without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and sections 6 and 7 (subd. [a]) of the New York Constitution. In addition, in my view, the challenged legislation constitutes an impairment of contractual obligations, invalid under United States Constitution, Article I, § 10.

The legislation at issue on this appeal directed the transfer of $190 million from the State Insurance Fund to the general fund of the State on March 1, 1983 and provided for future annual transfers in the same sum. Through an amendment to Workers' Compensation Law (adding § 87-f) there was provision for an annual "dry" appropriation of $190 million by the State which was deemed an "admitted asset of the state insurance fund (Workers' Compensation Law, § 87-f, subd. 2)." Concededly, the annual appropriation effected a transfer of a substantial sum to the State to be used for general revenue purposes, interest free, and with no real obligation to make repayment. As argued by appellants, the transfer results in the loss to the Fund of substantial moneys for future investment and does thereby have a negative impact upon the ability of the Fund to offer discount premium rates which, in the past, had been offered to preferred insureds. Inasmuch as section 89 of Workers' Compensation Law mandates premiums be fixed "at the lowest possible rate consistent with the maintenance of a solvent fund and of reasonable reserves and surplus", it is patently clear that the annual transfer of $190 million would effect a substantial reduction of income from future investment, which, in turn, would result in a loss of interest to the Fund of about $30,000,000 each year. This will directly increase future premium rates.

The majority places undue emphasis upon the finding that the State Insurance Fund is a state agency and, from that, concludes that all of its assets are state funds which may be used as the Legislature deems appropriate. While I agree that the Fund is a state agency, of significance is the fact that it is funded entirely through private sources, namely, employers,

and, in its operation and underlying purpose, has many of the attributes of a private insurance carrier. Employers who secure compensation coverage through the Fund have a basis for concluding that premium payments will be used in accordance with the statutory directives, including subdivision 1 of section 76 of the Workers' Compensation Law which provides that the Fund "shall consist of all premiums received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund and of interest earned upon moneys belonging to the fund and deposited or invested" and section 85 thereof, which makes the Commissioner of Taxation and Finance "the custodian of the state insurance fund" and permits the Commissioner to "deposit any portion of the state fund not needed for immediate use," directing that interest earned "shall be collected by him and placed to the credit of the fund." In addition, subdivision 1 of section 76 of the Workers' Compensation Law requires that funds collected "shall be applicable to the payment of losses sustained on account of insurance, to the payment of expenses * * * and to the payment of premiums for reinsurance." The statutory scheme does not authorize the use of such funds for general state purposes nor is there any such legislative intent shown. The legislation at issue here subverts the underlying statutory scheme by diverting funds from their sole intended purpose, i.e., the payment of claims and investment.

Stripping the statutory structure to its bare essentials and taking into account that the Fund operates as a mutual insurance pool, solely funded by premium payments by policyholders and money earned on investments from employer contributions, I fail to perceive the rationale of the majority in concluding that plaintiffs, as insureds, do not have a property interest in the Fund's surplus. The policies create contractual rights which have been infringed upon and the substantial loss of assets each year will have a negative impact upon the ability of the Fund to offer reduced premiums, as in the past. In addition, while the payment of dividends is a discretionary act, it is undisputed that the Fund did maintain a long-standing practice of paying dividends based upon available surplus. The

loss of funds and the consequential future loss of income will have an adverse effect upon the ability to continue that policy.

In short, the legislation amounts to an improper diversion of Fund assets from their intended purpose, contrary to the reasonable expectation of insured employers, who paid premiums to purchase insurance coverage, not to fund the general treasury of the State. Taking cognizance of the fact that the funds are held in a fiduciary capacity and their use and purpose earmarked by express statutory provision, no basis exists to sustain the legislation which, in effect, amounts to a raid upon the Fund. By analogy, the position of the majority would create a precedent which would inevitably lead to sustaining a legislative diversion of other specially earmarked funds, such as public pension and retirement funds. In either situation, there would be a taking of property without due process and without just compensation and, which in my view, is constitutionally infirm.

Nor may the legislation be sustained on the majority's finding that the State guarantees payments to injured claimants. The fact that the Fund is secured by the general assets of the State is not at all dispositive on whether those assets may be used for other State purposes. It is reasonable to conclude that any payment required of the State as guarantor, will be thrust upon the insured employees by the higher premiums or surcharges. Moreover, State's status as guarantor does not afford it a license to appropriate the Fund's assets, which are derived solely from private sources and investment. The appropriation, essentially directing the use of assets contrary to the express purpose for which the Fund was created, impinges upon the contractual rights of the policyholders and constitutes a taking of property without due process or just compensation. If additional surplus exists, more than reasonably necessary to satisfy anticipated claims, that surplus ought to be available in the future for investment purposes or distributed to policyholders in the form of additional dividend payments or reduced premiums, within the discretion of the State Insurance Fund, consistent with the statutory scheme of the Workers' Compensation Law.

Accordingly, the judgment, Supreme Court, New York County (William P. McCooe, J.), entered February 24, 1983, denying plaintiffs' motion for summary judgment and granting the cross motion by defendants State Comptroller Regan and State of New York for summary judgment, declaring as constitutional chapters 55 and 404 of the Laws of 1982, should be reversed, on the law, the motion granted, the cross motion denied and the legislation declared to be unconstitutional.

Order filed.

APPENDIX G

COURT OF APPEALS
STATE OF NEW YORK

New York County Clerk's Index No. 91531/82

AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AETNA CASUALTY AND SURETY COMPANY, ALLSTATE INSURANCE COMPANY, FARM FAMILY MUTUAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INTERBORO MUTUAL INDEMNITY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, MARYLAND CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UTICA MUTUAL INSURANCE COMPANY, GERALD J. PIERCE, WEST END BREWING COMPANY OF UTICA NEW YORK, MARILYN STROHSCHEIN, MADELINE CHRISMAN and ADOLFINA RUIZ,

Plaintiffs-Appellants,

—against—

RODERICK CHU, as Commissioner of Taxation and Finance of the State of New York; JAMES P. CORCORAN, as Superintendent of Insurance of the State of New York; and MARTIN A. FISCHER, ALBERT C. TODARO, EASTMAN BIRKETT, RIVKA CHATMAN, CHARLES G. MOERDLER, BART DIMATTINA, LOUISE COSTE, JAMES HENRY SCHOLTZ and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund of the State of New York,

Defendants-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SIRS:

PLEASE TAKE NOTICE that the plaintiffs-appellants in this case hereby appeal to the Supreme Court of the United States from the opinion and final order of the Court of Appeals entered in this action on February 21, 1985.

This appeal is taken pursuant to 28 U.S.C. 1257(2) and 2101.

Dated: New York, New York
May 15, 1985

Respectfully submitted,

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CLERK OF THE COURT OF APPEALS

CLERK OF THE COUNTY OF NEW YORK

APPENDIX H

Section 84, 1982 N.Y. Laws Ch. 55

"84. Such law is amended by adding a new section twenty-seven-c to read as follows:

27-c. Appropriations to the aggregate trust fund.

1. Notwithstanding any other provision of law, the aggregate trust fund, hereinafter referred to as the fund, and all state officers with responsibility for the custody or investment of such fund or of its assets, shall annually, no later than November first in each year, submit to the director of the budget a request for an appropriation of fifty million dollars. The governor shall include such amount in a budget bill for the next state fiscal year. The state comptroller shall encumber the amount so appropriated before the end of the fiscal year for which any such appropriation is made. If for any fiscal year commencing on or after April first, nineteen hundred eighty-three, the governor fails to submit a budget bill containing an appropriation in the amount requested by the fund or the legislature fails to appropriate the amount in a budget bill submitted by the governor for such fiscal year, the amount appropriated for and encumbered during the preceding fiscal year shall be payable forthwith to the fund on the first day of July of such year in the manner prescribed by law, provided, however, that such amount shall not exceed the amount of moneys transferred to the general fund by the fund pursuant to the provisions of a chapter of the laws of nineteen hundred eighty-two.

2. It is hereby found and declared that any appropriation made as provided for in subdivision one of this section shall be deemed an admitted asset of the aggregate trust fund, and that any transfer of moneys by the fund to the general fund in accordance with the provisions of a

chapter of the laws of nineteen hundred eighty-two is deemed a proper and prudent legal undertaking for any state officer with the responsibility for the custody or the investment of the assets of the fund, notwithstanding any other provision of law to the contrary."

Section 88, 1982 N.Y. Laws Ch. 55

"§ 88. The first unnumbered paragraph of section one hundred nine-b of such law is renumbered subdivision one and a new subdivision two is added to read as follows:

2. (a) Notwithstanding any provision of law to the contrary, the superintendent of insurance shall annually no later than November first in each year, submit to the director of the budget a request for an appropriation of sixty-seven million dollars. The governor shall include such amount in a budget bill for the next state fiscal year. The state comptroller shall encumber the amount so appropriated before the end of the fiscal year for which any such appropriation is made. If for any fiscal year commencing on or after April first, nineteen hundred eighty-three, the governor fails to submit a budget bill containing an appropriation in the amount requested by the superintendent of insurance or the legislature fails to appropriate the amount in a budget bill submitted by the governor for such fiscal year, the amount appropriated for and encumbered during the preceding fiscal year shall be payable forthwith to the stock fund on the first day of July of such year in the manner prescribed by law, provided, however, that such amount shall not exceed the amount of moneys transferred to the general fund from the stock fund pursuant to the provisions of a chapter of the laws of nineteen hundred eighty-two.

(b) It is hereby found and declared that any appropriation made as provided for in paragraph (a) of this subdivision shall be deemed an asset of the stock fund, and that any transfer of moneys from such fund to the general

fund in accordance with the provisions of a chapter of the laws of nineteen hundred eighty-two is deemed a proper and prudent legal undertaking for any state officer with the responsibility for the custody or the investment of the assets of the stock fund, notwithstanding any other provision of law to the contrary."

Section 90, 1982 N.Y. Laws Ch. 55

"§ 90. Section three hundred thirty-four of such law is amended by adding two new subdivisions six and seven to read as follows:

6. (a) Notwithstanding any other provision of law to the contrary, the superintendent shall annually no later than November first in each year, submit to the director of the budget a request for an appropriation of ninety million dollars. The governor shall include such amount in a budget bill for the next state fiscal year. The state comptroller shall encumber the amount so appropriated before the end of the fiscal year for which any such appropriation is made. If for any fiscal year commencing on or after April first, nineteen hundred eighty-three, the governor fails to submit a budget bill containing an appropriation in the amount requested by the superintendent or the legislature fails to appropriate the amount in a budget bill submitted by the governor for such fiscal year, the amount appropriated for and encumbered during the preceding fiscal year shall be payable forthwith to the fund on the first day of July of such year in the manner prescribed by law, provided, however, that such amount shall not exceed the amount of moneys transferred to the general fund from the fund pursuant to the provisions of a chapter of the laws of nineteen hundred eighty-two.

(b) Any appropriation made to the fund pursuant to the provisions of this section shall be included as an asset for the purposes of computing the value or net value of the fund pursuant to the provisions of this section.

7. Any transfer of moneys from the fund to the general fund in accordance with the provisions of a chapter of the laws of nineteen hundred eighty-two is deemed a proper and prudent legal undertaking for any state officer with the responsibility for the custody or the investment of the assets of the fund, notwithstanding any other provision of law to the contrary."

Section 92, 1982 N.Y. Laws Ch. 55

"§ 92. 1. Notwithstanding any other provision of law, the aggregate trust fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer fifty million dollars to the general fund by March first, nineteen hundred eighty-three.

2. Notwithstanding any other provision of law, the state insurance fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer one hundred ninety million dollars to the general fund by March first, nineteen hundred eighty-three.

3. Notwithstanding any other provision of law, the stock workmen's compensation security fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer sixty-seven million dollars to the general fund by March thirty-first, nineteen hundred eighty-three.

4. Notwithstanding any other provision of law, the property and liability insurance security fund and all state officers with responsibility for custody or investment of such fund or its assets, are authorized and directed to transfer eighty-seven million dollars to the general fund by March thirty-first, nineteen hundred eighty-three."

1982 N.Y. Laws Ch. 404

APPROPRIATION—STATE INSURANCE FUND, AGGREGATE TRUST FUND, STATE WORKMENS' COMPENSATION SECURITY FUND AND PROPERTY AND LIABILITY INSURANCE SECURITY FUND

Chapter 404

Approved June 28, 1982, effective as provided in section 3

AN ACT making an appropriation for the purposes of maintaining the solvency of certain reserve and security funds

Section 1. The sum of three hundred ninety-four million dollars ($394,000,000), or so much thereof as may be necessary, is hereby appropriated pursuant to the following schedule from any moneys in the general fund to the credit of the state purposes account not otherwise appropriated for the purpose of maintaining the solvency of the funds listed in such schedule.

SCHEDULE

To the State Insurance Fund; provided that no expenditure may be made from this amount if other assets of such fund not part of reserves for claims or losses are available	190,000,000
To the Aggregate Trust Fund; provided that no expenditures may be made from this amount if other assets of such fund not part of reserves for claims or losses are available	50,000,000
To the Stock Workmen's Compensation Security Fund; provided that no expenditure may be made from this amount if other assets of such fund are available for making payments as provided by law	67,000,000
To the Property and Liability Insurance Security Fund; provided that no expenditure may be made from this amount if other assets of such fund are available for making payments as provided by law	87,000,000
Total of Schedule	394,000,000

§ 2. No moneys shall be available for expenditure from this appropriation until a certificate of approval has been issued by the director of the division of the budget and a copy of such certificate has been filed with the state comptroller, the chairman of the senate finance committee and the chairman of the assembly ways and means committee. Such moneys shall be payable on the audit and warrant of the comptroller on vouchers certified or approved in the manner provided by law.

§ 3. This act shall take effect immediately and shall be deemed to have been in full force and effect from and after April first, nineteen hundred eighty-two.

Section 333(6), N.Y. Ins. Law

§ 333 *Motor vehicle liability security fund*

* * *

"6. The fund created by this section shall be separate and apart from any other fund and from all other state moneys, and the faith and credit of the state of New York is pledged for their safekeeping. The commissioner of taxation and finance shall be the custodian of said fund; and all disbursements from said fund shall be made by the commissioner of taxation and finance upon vouchers signed by the superintendent, or his deputy, as hereinafter provided. The moneys of said fund may be invested by the commissioner of taxation and finance only in obligations of the United States or of this state or of public benefit corporations the obligations of which are made securities in which public officers and bodies of this state may legally invest funds, or in interest bearing certificates of deposit of a bank or trust company located and authorized to do business in this state or of a national bank located in this state secured by a pledge of direct obligations of the United States or of the state of New York in an amount equal to the amount of such certificates of deposit. In addition, the commissioner of taxation and finance may invest up to thirty-three and

one-third percentum of the net value of the fund, as herein defined, in mortgage loans or deeds of trust on real property improved by one, two, three or four family residences owned by one or more individuals and occupied by an owner and located in the state of New York. The amount which may be so invested may not exceed the lesser of ninety percentum of the appraised value of the real property or thirty-five thousand dollars, if a one-family residence, forty thousand dollars, if a two-family residence, forty-five thousand dollars, if a three-family residence or fifty thousand dollars, if a four-family residence. The mortgages or deeds of trust shall provide for monthly payments of principal and interest in amounts sufficient to pay all interest and effect full repayment of principal within seventy-five percentum of the estimated remaining useful life of the building or thirty years, whichever is less. The commissioner of taxation and finance may sell any of the obligations, mortgages or deeds of trust, or certificates of deposit in which the fund is invested, if advisable, for its proper administration or in the best interests of such fund."

Section 27(6), N.Y. Work. Comp. Law

§ 27 *Depositing future payments in the aggregate trust fund*

* * *

"6. Such aggregate trust fund shall be kept separate and apart from all other moneys of the state fund, and shall not be liable for any losses or expenses of administration of the state fund other than the expenses involved in the administration of such trust fund including the cost, if any, of the actuarial computations made on behalf of the board, nor shall the state fund be charged with the losses or expenses of the aggregate trust fund beyond the amount of such trust fund. Any portion of such aggregate trust fund may be invested by the commissioners, with the approval of the superintendent of insurance, in the same

securities as provided in this chapter for the investment of the state insurance fund, and the commissioners may, upon like approval of the superintendent of insurance, also sell any such securities."

Section 109-b(1), N.Y. Work. Comp. Law

"§ 109-b. *Custody and investment of stock fund*

1. The stock fund created by this article shall be separate and apart from any mother fund so created and from all other state moneys, and the faith and credit of the state of New York is pledged for its safekeeping. The commissioner of taxation and finance shall be the custodian of said fund; and all disbursements from said fund shall be made by the commissioner of taxation and finance upon vouchers signed by the superintendent of insurance, or his deputy, as hereinafter provided. The moneys of said fund may be invested by the commissioner of taxation and finance only in the stocks or bonds of the United States or of this state and in interest bearing certificates of deposit of a bank or trust company located and authorized to do business in this state or of a national bank located in this state secured by a pledge of direct obligations of the United States or of the state of New York in an amount equal to the amount of such certificates of deposit. The commissioner of taxation and finance may sell any of the securities or certificates of deposit in which said fund is invested, if advisable for its proper administration or in the best interests of such fund, and all earnings from the investments of such fund shall be credited to such fund."